Petition

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81-1573

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

STEPHEN A. MCSHANE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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February 22, 1982

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QUESTIONS PRESENTED

A. Is the evidence in a criminal conviction and imprisonment for embezzlement and conversion under 18 U.S.C. §641 insufficient as a matter of law where the trial record shows that petitioner never received into his possession the money due the Veterans Administration and where the money was deposited by another person into a bank account to which two (2) persons other than petitioner had complete access and control?

B. Is the evidence in a criminal conviction and imprisonment under 18 U.S.C. §641 for embezzlement and conversion insufficient as a matter of law where Veterans Administration instructions regarding deposit of funds received were followed thus negating any specific intent to commit a crime.

C. It is plain error under F.R.Cr.P. 52(b) for the district court not to order a judgment of acquittal after the conclusion of the government's case because of insufficient evidence that petitioner either received or controlled the money in question on all counts of the indictment?

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No.____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

STEPHAN A. McSHANE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Stephen A. McShane prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case on November 23, 1981.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit dated November 23, 1981 (A-2) is not yet reported.

JURISDICTION

Jurisdiction in the Federal District Court was based on 18 U.S.C. §641.

The Court below on November 23, 1981 issued an opinion and judgment order (A-2). On January 20, 1982,

Mr. Justice Brennan signed an order extending the time for filing this petition for certiorari to and including February 21, 1982 (A-4). Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) and Rule 22 (2) of this Court.

STATUTORY PROVISION

18 U.S.C. §641. Public money, property or records

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

June 25, 1948, c. 645, 62 Stat. 725.

STATEMENT OF THE CASE

This case involves petitioner's conviction on nine (9) counts of embezzlement under 18 U.S.C. §641. Since no lower court opinion explains the factual situation, a brief resume follows:

Petitioner was a real estate broker whose real estate company, a partnership with two other partners, was approved by the Veterans Administration to handle transactions involving that federal agency's real estate. At

trial in the district court, the evidence showed that the company had several bank accounts — essentially escrow and business operating accounts. Petitioner was the only signatory on the escrow account. However, petitioner and his two partners were signatories to the operating account and any one of the partners could write a check from that account.

On Counts three (3), five (5), seven (7) and nine (9) of the indictment the evidence showed that money belonging to the Veterans Administration was received by an employee of petitioner's company and that the money in question was deposited into the operating account to which two other partners had equal access and control. No evidence was ever shown that petitioner made any deposits. In fact, petitioner testified that he did not make deposits at all. Nor, was it shown that he wrote any checks on the operating account.

On counts one (1), two (2), six (6) and eight (8) of the indictment the evidence showed that money was received by someone other than petitioner and that the money was deposited into the escrow account. On Count twelve (12), petitioner did receive a check at a settlement but the money was deposited, by another partner, into the business's operating account.

Further evidence at trial indicated that petitioner was under no duty to commit funds received to an escrow account. Both petitioner and a government witness from the Veterans Administration testified that that agency did not instruct petitioner as to what type of account Veterans Administration funds should be committed.

The Court below rejected petitioner's arguments that the convictions on all counts were based upon insufficient evidence and petitioner's lack of specific intent to commit the crimes. Additionally, the Court below rejected petitioner's argument that the district court's failure to reverse the convictions for want of sufficient evidence was plain and fundamental error under F.R.Cr.P. 52(b).

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted because the affirmance of the judgment by the Court below ignores this Court's rulings in *Morissette v. United States*, 342 U.S. 246 (1952) and *United States v. Johnston* 268 U.S. 220 (1925) and is in conflict with the Court of Appeals for the Fifth Circuit and its holding in *United States v. Black*, 497 F.2d 1039 (5th Cir.,1974).

Black is directly on point to the instant case. Black and wife were treasurer and assistant treasurer of a federal credit union. Money was received from a customer for deposit to the credit union. The government introduced a deposit slip which showed only a part of the customer's deposit going to the credit union's account. By stipulation, it was agreed that the remaining portion was deposited into Mr. and Mrs. Black's joint bank account. Id, at 1040. The Court ruled that the evidence was insufficient that Black converted or misapplied the money since Mrs. Black could have also done this. The Court stated:

> "The evidence did not exclude the reasonable hypothesis that someone other than appellant converted or misapplied the funds belonging to the Credit Union. Specifically, a reasonable hypothesis of Mr. Black's innocence is that Mrs. Black committed the crime.
>
> No witness testified Mr. Black received or negotiated the check. No witness testified that he deposited the $5,000 in cash in his joint bank account. No witness testified that appellant counselled, procured, aided or abetted any other person to do or commit any act in connection with this transaction. Neither the teller at the bank who administered the transaction nor a documents examiner or handwriting expert was offered to connect appellant to the charged transaction.

> The Government only demonstrated the circumstantial facts that appellant was treasurer of the Credit Union and a portion of the money in question was deposited in a bank account that appellant shared jointly with his wife. Had appellant exclusive control over the business affairs of the Credit Union, or had the account in which the monies were ultimately deposited been *exclusively* Mr. Black's, the reasonable hypothesis of innocence might have been excluded." (emphasis added) Id, at 1041.

As stated, *Black* is directly on point to the instant case, and the application of its principle to the instant case on Counts 3, 5, 7 and 9 require a reversal of petitioner's conviction and a Judgment of Acquittal.

Additionally, *Morissette*, supra, at 271, 272 held as follows:

> But knowing conversion requires more than knowledge that defendant was taking the property into his possession. He must have knowledge of the facts . . . that made the taking a conversion.

If petitioner never received money and that money was deposited by another into a bank account to which two (2) others had equal access and control and no evidence was offered that petitioner wrote checks on that account how, in view of *Morissette*, can the specific intent to embezzle and convert be proved beyond a reasonable doubt? It is submitted that such insufficient evidence cannot sustain the conviction.

This is particularly evident when, as here, no specific instructions were given to petitioner as to what type of account the funds should be committed. Therefore, no embezzlement or conversion can be committed when no duty exists to commit funds to an escrow account. At most, petitioner may have incurred only civil liability to the Veterans Administration. *United States v.*

Johnston 268 U.S. 220 (1925). *See, Government of the Virgin Islands v. Richards,* 618 F.2d 242 (3rd Cir., 1980).

> *Jackson v. Virginia,* 443 U.S. 307 (1979) supports petitioners contention that the district judge should have, *sua sponte,* ordered a judgment of acquittal at the close of the government's case because of the lack of sufficient evidence to convict petitioner on all counts and the Court of Appeal's failure to acknowledge the plain and fundamental error requires the intercession of this Court, through its supervisory powers, to correct the injustice that occurred below.

Jackson, supra, demands that a conviction by a jury be reversed by the district judge when "no rational trier of fact could have found proof of guilt beyond a reasonable doubt", at 334. It is submitted that the particular facts of this case, as outlined throughout this petition, meet the standard of *Jackson* and the district court should have ordered an acquittal on all counts for want of sufficient evidence to satisfy the constitutional requirement that no criminal conviction of any person shall be allowed except upon proof of guilt beyond a reasonable doubt. *Jackson,* at 309. Thus, the failure of the district court to grant an acquittal and the Court of Appeal's affirmance of the lower court's judgment requires the intercession of this Court to right the injustice that has occurred here.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be issued.

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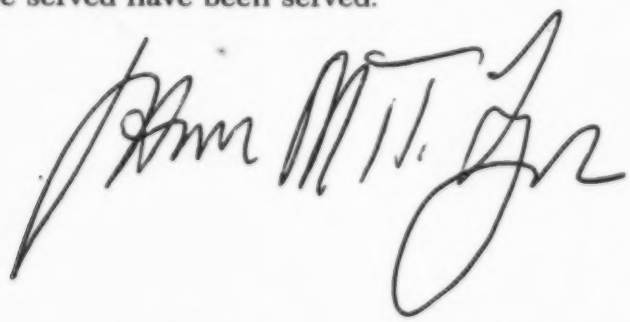
Counsel for Petitioner

February 22, 1982

I hereby certify that on this 22nd day of February, 1982, three (3) copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit were hand delivered to the Solicitor General of the United States, Department of Justice, Room 5614, Washington, D.C. I further certify that all parties required to be served have been served.



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Appendix

APPENDIX

A. Judgment Order and Opinion of the Court of Appeals ..... (A-2)

B. Order granting extension of time to file writ of certiorari dated January 20, 1982 ..... (A-4)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2631

UNITED STATES OF AMERICA

v.

STEPHEN A. MCSHANE,

Appellant

(D.C. Crim. No. 80-00183)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)

November 19, 1981

Before: GIBBONS and HIGGINBOTHAM, *Circuit Judges*
and MEANOR, *District Judge**

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---

* Hon. H. Curtis Meanor, United States District Judge for the District of New Jersey, sitting by designation.

JUDGMENT ORDER

Stephen McShane, convicted on nine counts of embezzlement and conversion from the Veterans administration in violation of 18 U.S.C. §641, appeals from a judgment of sentence. He contends:

(1) that the evidence is insufficient to support a conviction on Counts One, Two, Three and Five;

(2) that the evidence is insufficient to support convictions on Counts Seven, Nine and Twelve, and that the insufficiency, not raised prior to verdict, is plain error;

(3) that the government failed to prove the intent required by 18 U.S.C. §641.

There is no merit to these contentions.

It is ORDERED and ADJUDGED that the judgment of the district court is affirmed.

By the Court,

JOHN J. GIBBONS

Circuit Judge

Attest:

SALLY MRVOS

Sally Mrvos, *Clerk*

Dated November 23, 1981.

Supreme Court of the United States

No. A-641

STEPHEN A. McSHANE

Petitioner

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner, It is Ordered that the time for filing a Petition for Writ of Certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 21, 1982.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 20th day of January, 1982

Opposition

Supreme Court, U.S.
FILED
MAR 30 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1573

In the Supreme Court of the United States

OCTOBER TERM, 1981

STEPHEN A. MCSHANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to establish beyond a reasonable doubt that petitioner knowingly, intentionally and willfully embezzled funds of the Veterans Administration in violation of 18 U.S.C. 641.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1573

STEPHEN A. MCSHANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A-2 to A-3) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1981. On January 20, 1982, Justice Brennan extended the time in which to file a petition for a writ of certiorari to and including February 21, 1982 (Pet. App. A-4). The petition for a writ of certiorari was filed on February 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on nine counts of embezzlement in violation of 18 U.S.C. 641. Petitioner was sentenced to a one-year term of

imprisonment on one of the embezzlement counts (Count Five) and his sentence was suspended on the remaining counts. A five-year term of probation was also imposed. The court of appeals affirmed (Pet. App. A-2 to A-3).

The evidence at trial established that petitioner created and operated a real estate agency, McShane Realty (Tr. 1.120).[1] As part of his business, petitioner served as a broker for the sale of more than a dozen properties owned by the Veterans Administration (VA) (Tr. 1.122). In connection with the sale of three of the properties during April - July 1979, McShane Realty received nine checks totalling $109,015.71 from the buyers at settlement (Tr. 1.25). Four of the checks were deposited in an escrow account of McShane Realty from which petitioner alone could make withdrawals (Tr. 1.91). The others were deposited in an operating account of McShane Realty, from which petitioner, his mother, and his brother could withdraw money (Tr. 1.92-1.93).

Petitioner, along with all other brokers who participated in the sale of VA property, was instructed by letter from a VA official that, upon settlement of the sale of a property, brokers were to forward the settlement papers and the funds to the VA and thereafter receive their 5% commission (Tr. 1.22). When the VA did not receive the proceeds from the sale of the three properties involved in this case, a VA official made calls directly to petitioner demanding payment (Tr. 1.25), but the money from the sale was never received by the VA (Tr. 1.26).

Petitioner's defense was that the money from the sales had mistakenly been placed into an operating account of McShane Realty by his mother, the company bookkeeper.

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[1] "Tr." refers to the transcript of petitioner's trial before the district court.

According to petitioner's mother, she believed that checks that were the proceeds of VA sales were in fact commissions to be applied to the operating account of McShane Realty (Tr. 2.99-2.102).

ARGUMENT

Petitioner contends (Pet. 4-6) that the evidence was insufficient to establish that he intentionally embezzled funds belonging to the Veterans Administration. It is axiomatic that the evidence supporting petitioner's conviction must be viewed in the light most favorable to the government. *Burks* v. *United States*, 437 U.S. 1, 17 (1978); *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). Applying that standard, the court of appeals properly found (Pet. App. A-2 to A-3) that there is no merit to petitioner's claim.

Four of the checks were deposited into an escrow account for which petitioner was the sole signatory. The other checks were placed in the realty company's operating account. Petitioner admitted that during June-August 1979 his real estate agency was suffering grave financial setbacks and that both his escrow and operating accounts were overdrawn (Tr. 2.29-2.31). Petitioner thus had spent the VA's money and simply was unable to forward the proceeds of the sale of the houses to the VA when requested. The evidence thus gives rise to a strong inference that petitioner used the money temporarily to try to keep his business afloat.[2] This plainly is sufficient to violate the embezzlement statute. *Morissette* v. *United States*, 342 U.S. 246, 272 (1952); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

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[2]During the summer of 1979, petitioner had obtained a loan. He was asked at trial why he did not use the money to pay the VA part of what he owed. His response is a telling indication of why the VA money was not originally forwarded: "I had to use it to survive to try and keep it [the business] together, so I would have something to pay the whole amount back" (Tr. 2.37).

Petitioner argues (Pet. 4) that the decision of the court of appeals conflicts with the decision of the Fifth Circuit in *United States* v. *Black*, 497 F. 2d 1039 (1974). The evidence in this case is, however, significantly more incriminating than the evidence in that case. According to the court in *Black*, the government proved only that money from a credit union somehow made its way into a joint account owned by the defendant and his wife. There was no evidence as to how the money entered the account or whether it ever was taken from the account, and thus the court held that it was impossible to conclude beyond a reasonable doubt that the defendant and not his wife had committed the crime.

Petitioner argues (Pet. 4) that because his mother and brother had access to one of the accounts involved in this case, the facts are the same as in *Black*. With the exception of the coincidence of both cases involving accounts to which an individual other than the defendant had access, however, the cases are completely different. Petitioner had total control of the McShane Realty business (Tr. 1.129). His mother was a bookkeeper and his brother was a salesman. Petitioner's mother testified that she put money into the accounts and balanced the books, but she never indicated that she withdrew any money (Tr. 2.92). Indeed, she had absolutely no authority to withdraw money from the escrow account. The money that was placed in petitioner's business thus came within his dominant control over expenditures. Subsequently he was personally told to deliver the money to the VA, which he never did because the money had been used for other purposes.

Petitioner also asserts (Pet. 5) that the decision of the court of appeals conflicts with *Morissette* v. *United States, supra*. In this case, unlike *Morissette*, the jury received appropriate instructions concerning the prerequisites for conviction. The instructions contained a clear choice between the defense and prosecution hypotheses. The trial

court instructed the jury that in order to convict it must find beyond a reasonable doubt that the embezzlement was done knowingly, *i.e.*, voluntarily and intentionally and not because of mistake or accident or other innocent reason. The jury, based on sufficient evidence and proper instruction, disbelieved the defense hypothesis of innocent mistake[3] and found that petitioner had knowingly, intentionally and willfully embezzled VA funds. *United States* v. *Koppers Co.*, 652 F. 2d 290, 295 (2d Cir. 1981). Such a determination, upheld as supported by the evidence by a court of appeals, warrants no further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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D. LOWELL JENSEN
Assistant Attorney General

FRANCIS J. MARTIN
Attorney

MARCH 1982

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[3]This innocent explanation was based on the assertion that petitioner's mother mistook purchase payments for commissions (Tr. 2.99-2.102). However, one payment check was for over $30,000, and it simply was not credible to believe that that amount was mistakenly construed to be a 5% commission on a sale (Tr. 2.107-2.108). The explanation of mistake with regard to the $30,000 check is rendered even more untenable because the check stub, which was also delivered to petitioner, specifically stated that the check represented the proceeds of a VA sale and was to be forwarded to the VA (Tr. 1.98-1.100).